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**Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
THE LIBRARY OF CONGRESS
Washington, D.C.**

Copyright Royalty Board

In re

**DETERMINATION OF ROYALTY
RATES AND TERMS FOR
EPHEMERAL RECORDING AND
DIGITAL PERFORMANCE OF
SOUND RECORDINGS (*WEB IV*)**

Docket No. 14-CRB-0001-WR (2016-2020)

**PANDORA MEDIA, INC.'S RESPONSE TO
ORDER REFERRING NOVEL QUESTION OF LAW**

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INTRODUCTION

This reference was precipitated by SoundExchange's legal arguments, formally raised for the first time in post-trial briefing, concerning the purported scope of the evidentiary-bar language contained in Section 114(f)(5)(C) of the Copyright Act. That provision, as amended by the Webcaster Settlement Act of 2008 and the Webcaster Settlement Act of 2009 (the "WSAs"), merely provides that certain agreements executed in 2009 between SoundExchange and particular webcasters reflected a "compromise motivated by the unique business, economic and political circumstances of webcasters, copyright owners, and performers," and should not be "admissible as evidence or otherwise taken into account" in rate-setting before the Copyright Royalty Board (the "CRB"). *See* 17 U.S.C. § 114(f)(5)(C). SoundExchange seeks dramatically to expand this limited statutory prohibition – which, by its terms, applies to those 2009 settlement agreements themselves, none of which are at issue in this proceeding – to bar the consideration of what are, in fact, different rates and terms embodied in entirely different marketplace agreements struck *five years later* between Pandora and thousands of individual sound recording copyright owners, through their agent Merlin. As explained below, nothing in Section 114's plain language or its legislative history provides any support for SoundExchange's arguments which, in the end, have nothing to do with the correct application of the statutory provision at issue, and everything to do with attempting to extirpate from the record what is the most probative evidence of the rates willing buyers would pay willing sellers in a competitive market for the rights at issue.

The now-concluded hearing record reveals that Pandora has, despite a long history of record company resistance, begun to succeed in executing bilateral license agreements with individual record companies conveying rights encompassed by the Section 112 and 114 statutory

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licenses. Those agreements, for the reasons explicated during the hearing, paradigmatically reflect the forces of competition at work between and among record labels. That competition takes the most classic form: offering discounted per-play rates to Pandora in exchange for increased performances of the songs in the licensing record labels' repertoires. The leading such set of direct licenses are those entered into between Pandora and more than [REDACTED] independent record companies through negotiations with those companies' designated licensing agent, Music and Entertainment Rights Licensing Independent Network B.V. ("Merlin") (hereinafter, the "Merlin Agreement").

The hearing record demonstrates that these breakthrough industry agreements were entered into voluntarily; both Pandora *and* the record company counter-parties had the option of continuing to license the various label repertoires to Pandora at the prevailing statutory rates, which were established in 2009 by the so-called "Pureplay" settlement agreement (the "Pureplay Agreement"). That many thousands of record labels chose *not* simply to fall back on the prevailing statutory rates but, instead, to license their repertoires to Pandora *at lower per-play rates* to induce increased plays, constitutes compelling, real-world evidence as to what the governing legal standard in this proceeding calls for: rates willing buyers would pay willing sellers in a workably competitive market for the rights encompassed by the Section 112/114 statutory licenses. *See* 17 U.S.C. § 114(f)(2)(B).

In the face of this highly probative evidence – direct licenses between buyers and sellers of the identical rights at issue in this proceeding reflecting price competition amongst sellers to have their works performed – SoundExchange has trumped up a series of post-hearing legal arguments designed not only to avoid meeting this evidence head-on, but to preclude the Judges from considering it altogether. One such tactic is the subject of this referral: the meritless claim

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that the constraints placed around precedential use of the 2009 Pureplay Agreement somehow preclude consideration of the Merlin Agreement.

As set forth in Section I, the legal predicate for SoundExchange's argument – reflected in the five questions of law referred to the Copyright Office by the Judges (the "Referred Questions") – is wholly unfounded. SoundExchange presses for a startlingly overbroad interpretation of Section 114(f)(5)(C) of the Copyright Act notwithstanding the fact that (i) nothing in the controlling statutory language or legislative history so much as hints at so sweeping an interpretation of the scope of the evidentiary exclusion; (ii) the Merlin Agreement is the product of five-years-later voluntary negotiations among private parties (not SoundExchange) untethered from the WSAs and reflecting instead their respective assessments of their economic and competitive interests under existing market conditions; (iii) the operative "bottom line" rates of the Merlin Agreement are different, and *lower* than, those reflected in the Pureplay Agreement; (iv) SoundExchange's argument directly contradicts 17 U.S.C. §114(f)(2)(A)-(B), which expressly invites the Judges' consideration of private agreements like the Merlin Agreement; and (v) SoundExchange itself has relied on provisions of the Pureplay Agreement in advancing its own affirmative case.

SoundExchange's attempted extension of Section 114(f)(5)(C) to the Merlin Agreement has far-reaching implications. Congress passed the WSAs, which bar CRB consideration of certain WSA Agreements negotiated by *SoundExchange* (not by individual record companies), for a particular reason: to encourage SoundExchange to negotiate less onerous rates than those announced by the Judges in the 2007 *Web II* determination. And it provided the bar on the use of any such agreements as precedent for a related, explicitly specified reason: so that SoundExchange, facing pressure to enter such agreements, would not be construed as a "willing

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seller” at those rates in future CRB proceedings. *See* 17 U.S.C. § 114(f)(5)(C). Congress clearly did not intend to (and did not by its statutory text) constrain consideration in future CRB proceedings of subsequent marketplace deals entered into by willing buyers and willing sellers (let alone sellers other than SoundExchange) on the basis that some lawyer might argue or an economist might testify that the rates or terms therein bore some resemblance – were somehow “derived from” or “influenced” by – one or more non-precedential WSA Agreements. To so construe congressional intent would be tantamount to rendering all manner of later marketplace agreements for any of the rights covered by Section 112/114 statutory licenses inadmissible simply because the parties to those agreements, as one would expect, considered the prevailing statutory rates as a part of their negotiations. Sophisticated parties do not bargain in a vacuum. Congress theoretically could have decreed that any post-WSA agreements that conceivably were “influenced by” or “derived from” or “refer to” a non-precedential WSA Agreement were barred from consideration by the Judges in a proceeding such as this. It commonsensically did no such thing; to the contrary, as noted, the statute *invites* consideration of precisely such agreements. *See* 17 U.S.C. 114(f)(2)(B).

SoundExchange’s argument proves too much. While its narrow interest here is to expunge all references to the Merlin Agreement from the record, the reach of its illogic sweeps far more broadly. It would in practice eliminate consideration of virtually every benchmark agreement offered by all parties, SoundExchange included. Every economist in this proceeding acknowledged that *all* of the agreements under consideration, including those entered into by statutory services and by interactive services alike, are influenced to some degree by the prevailing statutory rates (including the Pureplay rates) whether the agreements make that connection explicit or not. *See, e.g.,* Rubinfeld CWDT ¶ 91. The fact that the *degree* of

influence might vary as between agreements entered into by statutory licensees versus interactive services affords no legal distinction under SoundExchange's construct; none would be capable of being used as a rate-setting benchmark. Even were such an effort at line-drawing attempted, it would be fraught with subjectivity, and would inevitably result in economically similar agreements being treated differently in terms of admissibility.

Moreover, as detailed in Section II, SoundExchange has waived its underlying arguments. Although aware of the Services' benchmark evidence (including the Merlin Agreement) since the time that written direct statements were filed last October, SoundExchange hedged its bets throughout the proceeding, up to and including the trial phase. Hoping to tear down the probative force of Pandora's benchmark on its merits but uncertain of its ability to do so, SoundExchange announced that it would seek to build a "provisionally admitted" record surrounding the Merlin Agreement – including in particular its supposed linkages to the Pureplay Agreement – while, without the benefit of any legal basis for doing so, claiming to reserve the right, following completion of the hearing, to challenge the very record it intended to help build on the basis that the Judges are actually barred from taking account of the provisions of the Pureplay Agreement – and thus, by extension, the Merlin Agreement – by 17 U.S.C. § 114(f)(5)(C).¹ In other words, SoundExchange, unilaterally devising its own proposed rules of procedure, sought to give itself a free look at what the trial record demonstrated as to Pandora's key rate-setting benchmark.

¹ See SoundExchange's Objections to Testimony and Exhibits, dated April 20, 2015 ("SX Objections"), p. 4 (proposing that the Judges "provisionally admit evidence related to the Pureplay Settlement Agreement" so that the "parties can develop a full record at the hearing"); 4/27/15 Tr. 70:13-22 (Opening Statement) (same); SoundExchange Proposed Conclusions of Law ("SX PCL") ¶ 39 n.6 (same).

SoundExchange waived whatever legal argument it may have been permitted timely to raise by tactically waiting until the close of the hearing – following its failed efforts to diminish the force of the Merlin Agreement – to finally assert as a so-called “gating issue” that Section 114 renders *any* portion of *any* marketplace agreement by a statutory webcaster irredeemably tainted and inadmissible. That waiver is reinforced by the additional considerations that SoundExchange (i) submitted its own agreements that themselves refer to the rates contained in the Pureplay Agreement; (ii) posited that the Pureplay Agreement “drove down” the rates in the interactive marketplace (from which its own benchmarks spring); and (iii) successfully advocated a position in *Satellite II* that is contrary to its analysis here.

For all of these reasons, and those set forth in more detail below, SoundExchange’s attempt to stretch Section 114(f)(5)(C) far beyond the limited purposed for which it was intended in 2008-2009 should be summarily rejected. The Copyright Office should answer “No” to each of the Referred Questions.

ARGUMENT

I. THE JUDGES MAY CONSIDER THE MERLIN AGREEMENT IN ITS ENTIRETY, INCLUDING ITS RATE PROVISIONS

A. The Plain Text of the Statute Prohibits Only Consideration of WSA Agreements Entered Into By SoundExchange Themselves, Not Market Agreements (or Provisions Thereof) that Might be Claimed To Mirror, Be Derived from, or Otherwise Be Influenced by a WSA Agreement

It is a fundamental principle of statutory construction that in determining the meaning of a statutory provision, courts “‘look first to its language, giving the words used their ordinary meaning.’” *Lawson v. FMR LLC*, 134 S. Ct. 1158, 1165 (2014) (quoting *Moskal v. United States*, 498 U.S. 103, 108 (1990)). As the Supreme Court has regularly held, “[a]s in any case of statutory construction, our analysis begins with ‘the language of the statute’ . . . [a]nd where the statutory language provides a clear answer, it ends there as well.” *See Hughes Aircraft Co. v.*

Jacobson, 525 U.S. 432, 438 (1999) (citations omitted). It is thus well-established that where, as here, “the statute’s language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms.” *Lamie v. U.S. Trustee*, 540 U.S. 526, 534 (2004) (citations omitted).

Section 114(f)(5)(C) states that no “provisions of any agreement entered into pursuant to subparagraph (A), including any rate structure, fees, terms, conditions, or notice and recordkeeping requirements set forth therein, shall be admissible as evidence or otherwise taken into account in” a CRB proceeding. 17 U.S.C. § 114(f)(5)(C). Subparagraph (A), in turn, clarifies that the agreements rendered inadmissible by the prohibition in subparagraph (C) are those entered into by the “receiving agent,” *i.e.*, SoundExchange, pursuant to the Webcaster Settlement Acts of 2008 and 2009. *See* 74 Fed. Reg. 34796, 34796 (July 17, 2009). This language could not be plainer. The statutory bar on admissibility thus pertains solely to (i) the terms of “any agreement” (ii) entered into by SoundExchange, as the record industry’s “receiving agent” pursuant to CRB designation (*see* 37 C.F.R. § 380.4(b)) (iii) pursuant to the Webcaster Settlement Acts of 2008 and 2009.²

Pandora in this proceeding has not sought to admit the Pureplay Agreement or any provision of that agreement into evidence. Nor has Pandora asked the Judges to “take account of” any provision of the Pureplay Agreement. Instead, Pandora has offered (i) an entirely distinct bilateral agreement entered into in 2014 (ii) between it and Merlin (an agent for rightsholders – not SoundExchange, and not a “receiving agent”), (iii) the terms of which were

² The Pureplay Agreement is one of several agreements that SoundExchange entered into in 2009 pursuant to its authority under the WSA. *See* 74 Fed. Reg. at 34796; *see also* 155 Cong. Rec. H6330 (June 9, 2009) (Rep. Brown explaining that “the Webcaster Settlement Act of 2009[] grants limited statutory authority to SoundExchange . . . to effect an agreement that has already been negotiated with certain ‘pureplay’ Webcasters for the performance of sound recordings over the Internet”).

freely negotiated and privately agreed to outside of any WSA framework and without any other compulsion on either side to agree to them. This recognition that the plain language of Section 114(f)(5)(C) has not been implicated should, as a practical matter, end the inquiry and without more lead to a “No” response to each of the Referred Questions. *See Hughes Aircraft*, 525 U.S. at 438.

SoundExchange nonetheless contends that admitting the Merlin Agreement (or, at an even further remove, benchmark analysis of that agreement by Pandora’s expert economist) would be the *equivalent* of admitting or taking account of the provisions of the Pureplay Agreement because (1) the rate formula in the Merlin Agreement [REDACTED]
[REDACTED]
[REDACTED]; and/or (2) the rates that Pandora and Merlin negotiated between themselves were allegedly “influenced by” or derived from those in the Pureplay Agreement. *See, e.g.*, 7/21/15 Tr. 7691:2-22, 7693:7-15, 7716:1-7717:5 (SoundExchange Closing Argument); SX PCL ¶ 47. This contention is reflected in the Judges’ Referred Questions, which seek to determine whether any such relationship between certain provisions in private and WSA agreements forbids the Judges from considering the privately negotiated provisions (Q. 5) or even the entire privately negotiated agreement (Q. 1-3). The unequivocal answer is No.

Starting with **Referred Questions 1, 2, and 5**, even assuming *arguendo* that the Merlin Agreement mimicked the rates and terms incorporated in the Pureplay Agreement (which, the agreement on its face, and as applied in practice, plainly does not), nothing in the statutory text so much as suggests, let alone requires, disregarding such a subsequently negotiated agreement. As noted, Section 114(f)(5)(C) provides solely that the Judges shall not admit or take account of

the provisions of *certain specific agreements negotiated by SoundExchange during a defined period of time*. If Congress had intended the prohibition to extend to provisions in subsequent bilateral marketplace agreements, to dealings between individual rightsholders (rather than SoundExchange) and digital services, and to market circumstances different from those giving rise to the 2008/2009 WSAs (to ameliorate the perceived ill effects of the *Web II* ruling), it could and would have done so. It did not.

SoundExchange's argumentation also is illogical and counterfactual. The Merlin Agreement is not the Pureplay Agreement. There is not even a hint of record support for the notion that both Pandora and Merlin purported simply to "dress up" the Pureplay Agreement in a different format somehow to circumvent the above-discussed evidentiary bar. The very face of the Merlin Agreement itself dispels any such notion. Most prominent among its differences is the bottom line rate structure which, [REDACTED]

[REDACTED]³ At the end of the day, the Judges need not know the "rates structure, fees, terms, conditions, or notice and recordkeeping requirements set forth" in the Pureplay Agreement to understand and calculate the rates paid under the Merlin Agreement as a benchmark in the CRB proceeding. The Merlin Agreement and its distinct terms speak for themselves as contemporary marketplace evidence of rates that willing buyers in fact are paying willing sellers under competitive conditions.

As such, SoundExchange misses the mark, not only in attempting to contort the limited scope of Section 114(f)(5)(C)'s evidentiary bar, but further in purporting to characterize

³ This structure, and its generation of meaningfully lower rates than the Pureplay rates, is indisputable on the hearing record. *See, e.g.,* Pandora's Proposed Findings of Fact and Conclusions of Law ¶¶ 106-07, 110-14, 116-22; Pandora's Reply to SoundExchange's Proposed Conclusions of Law and Findings of Fact ("Pandora Reply Findings") ¶¶ 44, 46-47, 61-63.

admission of the Merlin Agreement as somehow “taking account of” the Pureplay Agreement, notwithstanding the many meaningful differences between the two (including most notably the bottom-line rates paid by Pandora under each). That the existence of the Pureplay Agreement and the fact that Pandora was paying thereunder was a fact known to the negotiators forms no basis for concluding that the Judges are “taking account of” the Pureplay rates by admitting the Merlin Agreement. Adopting such a conception of the sweep of the “taking account” language of Section 114(f)(5)(C) would be tantamount to denying the realities of how markets operate. All economic actors consider the prevailing prices paid for goods and services in making their own purchase and sales decisions; the essence of competition involves sellers seeking to undercut those prevailing prices to earn sales (or here, a license). To put competitive, contemporaneous marketplace valuations of the very rights involved in this proceeding into a judicial black box on the basis that such transactions were negotiated down from statutory rates set several years earlier would defy common sense and economic reality. It also would effectively call for disregarding every set of benchmark agreements proposed by all parties insofar as all license agreements negotiated in this market are to some degree impacted by the prevailing statutory rates and terms.⁴

This recognition responds as well to **Referred Questions 3 and 4**, inquiring as to the proper treatment of marketplace agreements that may have been “**influenced by**” or **that may**

⁴ Economists for all the parties in the *Web IV* proceeding acknowledged the basic economic truism that *all* private agreements are to some degree influenced by statutory rates. *See, e.g.,* Shapiro WDT p. 15; Fishel/Lichtman AWDT ¶¶ 19, 44, 46; 5/5/15 Tr. 1783:1-1785:22 (Rubinfeld); 7/21/15 Tr. 7223:20-25 (SoundExchange Closing Argument). Indeed, SoundExchange’s own witnesses even argued that their own *on-demand* agreements are so influenced. *See, e.g.,* Harrison CWDT ¶ 18. As SoundExchange’s own principal economist openly admitted, “interactive rates also have been affected to a certain degree by the statutory and pureplay settlement rates.” Rubinfeld CWDT ¶ 91.

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“refer to”⁵ a non-precedential WSA agreement. Here as well, the relevant statutory language nowhere states that the Judges shall not admit later agreements (or provisions thereof) that may, however interpreted, be said to have been “influenced by,” “derived from,” or “refer to” the agreements negotiated by SoundExchange in the unique setting and circumstances created by the WSAs. And it most certainly does not constrain the Judges from taking account of rates that, as the unequivocal hearing record reveals, offer a *discount* off the rates in the Pureplay Agreement, *i.e., different and lower* effective rates agreed to by different sellers at a different time who were under no compulsion to agree to such different rates.

To conclude otherwise not only would misinterpret the law, but would also undermine the core function of this proceeding: to determine from contemporaneous marketplace agreements the rates that approximate those that willing *statutory webcasters* would agree to pay willing record company buyers in a *competitive* market. Under SoundExchange’s interpretation of the law (however selectively it attempts to apply it),⁶ the Judges literally would be blocked from considering provisions of any privately negotiated agreements that ostensibly were *influenced* in some way by a WSA agreement. As SoundExchange elsewhere explicitly urges

⁵ The only explicit “reference” to the Pureplay Agreement in the Merlin Agreement occurs in a

That “reference to” the Pureplay Agreement, even by SoundExchange’s lights, should be wholly innocuous insofar as it does not relate in any way to (let alone incorporate) any of the economic terms of the Pureplay Agreement that are to be treated as non-precedential under Section 114(f)(5)(C), but

⁶ Prior to the commencement of the hearing, SoundExchange “objected” to iHeartMedia’s direct license agreements under the same purported “statutory proscription” (which SoundExchange deemed “absolute”) and referred to the Merlin Agreement as only an “example” of evidence that purportedly “incorporates the Pureplay Settlement Agreement’s rates and terms.” See SX Objections, pp. 2-3 and Ex. A. In its post-trial filings, SoundExchange has sought to apply this “absolute” bar only to the Merlin Agreement, further demonstrating the lack of any principled rationale for its legal position.

see, e.g., SX PCL ¶¶ 39-48; 7/21/15 Tr. 7693:7-15, 7716:1-7717:5, the practical import of this injunction would be to bar the Judges' consideration of *any* voluntary agreement between a webcaster and record label entered between 2009-2015 (when the Pureplay Agreement expires).⁷ While this outcome would be very much to SoundExchange's liking, it would contravene the law. Indeed, SoundExchange's legal argument runs headlong into Section 114(f)(2)(B), which explicitly encourages the Judges to consider marketplace agreements between statutory services and rightsholders. That section does not qualify that invitation with language excepting agreements that were "influenced by" the statutory rates set forth in the Pureplay or other WSA agreements, and any such gloss would contravene the settled canon of statutory construction that requires courts to give effect to all provisions of a statute as a "harmonious whole." See *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (internal quotation marks and citation omitted); *Adirondack Med. Ctr. v. Sebelius*, 740 F.3d 692, 698-99 (D.C. Cir. 2014).⁸

⁷ This is no exaggeration. At closing, counsel for SoundExchange argued that "the statute is quite clear in saying the *shadow* of [the Pureplay Agreement] may not be taken in account in [the CRB] rate setting." 7/21/15 Tr. 7695:21-24 (SoundExchange Closing Argument) (emphasis added). He also argued that the Judges could not consider Pandora's expert's analysis of whether Pandora had successfully "steered" its plays towards Merlin tracks (separate and apart from the rate paid for such tracks) because "Pandora had the pureplay settlement agreement to fall back on" and if Pandora did not reach an agreement with Merlin, it could "simply continue to proceed" under that agreement. *Id.* at 7694:18-7695:24.

⁸ SoundExchange's gloss on the law also poses the prospect of hopelessly subjective line-drawing exercises. How would the Judges determine how much "influence" is acceptable, and how much triggers the bar? See, e.g., 7/21/15 Tr. 7724:1-11 (SoundExchange counsel suggesting unhelpfully that the Court must "decide" whether the "taint" of the statutory license is "tangential or remote or whether it's direct and causal"); *id.* at 7717:7-15 (SoundExchange's counsel suggesting an comprehensible "unrelated forces" test to distinguish the supposedly disqualifying influence of statutory rates on the Merlin Agreement from the admitted influence of those rates on SoundExchange's own interactive service benchmark). Or, to give a specific example, how would the Judges distinguish the admissibility of a benchmark agreement calling for a rate of .13 cents per play (the 2014 Pureplay rate) less a .02 cent discount, as compared to an agreement simply calling for a rate of .11 per play?

SoundExchange was free, and indeed extensively attempted, to diminish the probative value of the Merlin Agreement, as well as other direct license agreements entered into by iHeartMedia, through factual and economic arguments and evidence adduced at the hearing.⁹ The Judges can, and will, evaluate that effort along with the balance of the hearing record. But that is a far cry from the present effort, in the guise of legal interpretation of Section 114(f)(5)(C), peremptorily to exclude from any consideration whatsoever such plainly probative agreements.

B. The History of Section 114(f)(5) Supports a Narrow, Non-Preclusive Reading of the Statute

Although the plain language of Section 114(f)(5) alone should provide clear answers to the Referred Questions, the correctness of that straightforward reading of the statutory text is only reinforced by the pertinent legislative history. *See Harris v. Garner*, 216 F.3d 970, 977 (11th Cir. 2000) (considering legislative history, though strictly unnecessary in light of the plain meaning of the statute at issue, because it “support[ed] and complement[ed]” the statutory language’s plain meaning). The prohibition on admissibility of agreements entered pursuant to the Webcaster Settlement Acts reflects Congressional concerns unique to the circumstances confronting the webcasting industry in 2002 when the original Small Webcaster Settlement Act (“SWSA”) passed, and in 2008 and 2009, when the Webcaster Settlement Acts leading to the Pureplay Agreement were enacted. The Judges’ admission of a bilateral marketplace agreement from 2014 does not implicate any of those concerns.

⁹ Underscoring this point, economists for all parties testified extensively as to the perceived merits and demerits of the various proffered benchmarks. That testimony included opinions as to the supposed impact of “the shadow” cast by the statutory license (including the Pureplay Agreement) on the probative value of the benchmarks before the Judges. All of that is fair game and it is for the Judges to evaluate that testimony and draw appropriate conclusions therefrom in terms of the weight to be given the competing benchmarks.

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As was the case with the small webcasters in 2002, the rates set by the Copyright Royalty Judges in 2007 in the *Web II* proceeding were widely viewed as threatening the existence of the webcasting industry more generally. Industry participants and consumers who enjoyed their music offerings deluged Congress with pleas for relief from the rates set by the CRB. *See, e.g.*, 154 Cong. Rec. H10279 (Sept. 27, 2008) (statement of Rep. Inslee) (“Certainly a lot of businesses were jeopardized by this decision [in *Web II*].”); *id.* at H10280 (statement of Rep. Cannon) (“We know that the rates set by the CRB would have killed Internet radio.”); *id.* (statement of Rep. Lofgren) (“Since the Copyright Royalty Board announced its decision dramatically increasing royalty rates for webcasters, Internet radio has really been in serious jeopardy. In some cases, fees under the ruling actually exceeded the revenue, obviously a business model that is impossible to sustain Members of Congress have worked very hard to reach a negotiated compromise that would supersede the CRB decision and preserve the continued viability of Internet radio.”).

Congress reacted with the Webcaster Settlement Act of 2008, which granted SoundExchange (the designated “receiving agent”) a period of time to negotiate new, alternative rates with statutory webcasters. Webcaster Settlement Act of 2008, Pub. L. No. 110-435 (amending 17 U.S.C. § 114(f)). The legislation, building off the statutory framework established by the SWSA in 2002, allowed that the rates in any such agreements entered into by SoundExchange would bind not only SoundExchange’s members, but all sound recording owners, *i.e.*, they would be available as industry-wide statutory rates. 17 U.S.C. § 114(f)(5)(B). Congress extended the negotiating window with the Webcaster Settlement Act of 2009, during which period the Pureplay Agreement was struck. Webcaster Settlement Act of 2009, Pub. L.

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No. 111-36 (amending 17 U.S.C. § 114); 155 Cong. Rec. S6740 (June 17, 2009) (statement of Sen. Leahy).

Given the unique circumstances surrounding the WSAs and the attendant congressional pressure to reach new deals at rates below those set by the Judges, Congress tempered the anticipated adverse reaction of the record industry by providing that any agreements that SoundExchange struck on the record industry's behalf would not be admissible or taken into account as precedent in future rate proceedings, absent agreement of the parties to the agreement. Specifically, Congress provided that neither the webcasters nor SoundExchange could come into a CRB proceeding and claim that a WSA agreement reflected an agreement between a willing buyer and willing seller:

It is the intent of Congress that any royalty rates, rate structure, definitions, terms, conditions, or notice and recordkeeping requirements, *included in such agreements* shall be considered as a compromise motivated by the unique business, economic and political circumstances of webcasters, copyright owners, and performers rather than as matters that would have been negotiated in the marketplace between a willing buyer and a willing seller, or otherwise meet the objectives set forth in section 801(b).

17 U.S.C. §114(f)(5)(C) (emphasis added); *see also* 154 Cong. Rec. H10279 (Sept. 27, 2008) (statement of Rep. Berman) (noting that an agreement reached pursuant to the WSA “would not be precedential, unless, of course, the parties agreed that it should be”).

This stated interest in promoting agreements that would reflect new and lower rates to replace those announced in a prior webcasting proceeding (by immunizing those agreements from being cited as precedent) is *not* what SoundExchange's argument (prompting the Referred Questions) seeks to preserve. Pandora did not seek to move the Pureplay Agreement into evidence or otherwise suggest that it reflects the rates a willing seller would negotiate. Indeed, unlike SoundExchange (*see infra* Parts II.B, C), it did not ask the Judges to take account of the

Pureplay Agreement at all. What SoundExchange attacks instead is an agreement, at effectively lower rates, that was negotiated five years later, outside the WSA framework, by record industry entities other than SoundExchange, and one that was freely entered into by thousands of individual willing record-company sellers in circumstances where all interested parties had full knowledge of the relevant market facts and where the sellers could have walked away from the deal in favor of the *higher* prevailing statutory rates if they were not satisfied with the deal terms. This context is completely distinct from that eliciting Congress's determination to insulate the terms of the WSA agreements themselves from use as precedent. Commonsensically, neither the text of the statute nor its history suggests that agreements struck in such a divergent context — two parties negotiating freely several years after the WSAs — would be barred from consideration merely because of the supposed “influence” of the existing statutory rates upon them.

This legislative history only underscores the infirmity of SoundExchange's legal interpretation and why the response to each of the Judges' Referred Questions — both as to specific provisions and benchmark agreements in their entirety — should be “No.”

II. SOUNDEXCHANGE HAS WAIVED ANY ARGUMENT UNDER SECTION 114(F)(5)(C)

As detailed above, SoundExchange's arguments fail under the plain meaning of Section 114, ignore the unique circumstances and context that gave rise to the Pureplay Agreement, and have perverse implications that defy basic common sense and marketplace realities. In any event, they have been waived as a result of SoundExchange's delay in presenting the issue, as well as its inconsistent positions and evidentiary submissions in this and other proceedings before the CRB.

A. SoundExchange Improperly Waited Until the Close of the Hearing to Argue that the Services' Benchmarks Are Inadmissible

The Judges in this proceeding set a schedule that included an April 1, 2015 deadline for filing motions *in limine*. See Order Establishing Revised Case Schedules (Aug. 29, 2014). Instead of filing a motion *in limine* at that time, which the Judges could have considered and ruled on prior to the commencement of the hearing, SoundExchange hedged its bets, and waited until April 20th to aver to the Judges that it had an issue with Pandora's primary benchmark. Even then, instead of objecting to admission of the Merlin Agreement outright and moving to strike it, SoundExchange instead "propose[d] that the Judges provisionally admit evidence related to the Pureplay Settlement Agreement" so that the "parties can develop a full record at the hearing." SX Objections, p. 4; *see also* 4/27/15 Tr. 70:13-22 (Opening Statement) (proposing that the Judges "provisionally admit evidence relating to the Pandora-Merlin deal and the [Pureplay] deal so that Your Honors can later consider whether the Pandora-Merlin deal can even be considered as a benchmark in this proceeding under the Webcaster's settlement."); 5/18/15 Tr. 4195:10-4196:10 (failing to object or renew provisional objection to the Merlin Agreement, PAN Ex. 5014, when it was entered into evidence). In other words, SoundExchange made the strategic decision to wait to actually seek to exclude the Merlin Agreement as purportedly "tainted" until it could first seek – witness after witness – to diminish the force of that agreement by itself invoking the Pureplay Agreement and its provisions during cross examinations.

True to its stratagem, SoundExchange conducted lengthy cross examinations entirely unfettered by any purported restrictions that references to the Pureplay Agreement might impose. See Pandora Reply Findings § II.B. Having wholly failed in its efforts to undermine the economic salience of the Merlin Agreement, SoundExchange now seeks – only *following* the

hearing – to bar its admission. *See* 7/21/15 Tr. 7721:20-7723:4 (SoundExchange Closing Argument). Such transparent gamesmanship on a supposedly “gating issue,” *see id.*, should not be countenanced. *See Luce v. U.S.*, 469 U.S. 38, 40 n.2 (1984) (“‘*In limine*’ has been defined as ‘[o]n or at the threshold; at the very beginning; preliminarily,’” and “refer[s] to any motion, *whether made before or during trial*, to exclude *anticipated* prejudicial evidence *before* the evidence is actually offered.”) (emphases added); *see also Crocker v. Piedmont Aviation, Inc.*, 743 F. Supp. 1, 1 (D.D.C. 1989) (“The purpose of a motion in limine is to ‘procure a definitive ruling on the admissibility of evidence at the outset of the trial’”) (citing 21 C. Wright & K. Graham, Jr., *Federal Practice and Procedure* § 5037, at 194 (1977)). If SoundExchange believed the Merlin Agreement should have been struck, it should have done so by the April 1 deadline set by the Judges.¹⁰

B. Having Invoked Pureplay as Part of Its Affirmative Case – and Even Offered Benchmark Agreements that Utilize Pureplay Rates – SoundExchange Cannot Argue that Similar Evidence from the Services Is Statutorily Barred

While SoundExchange purports to use the existence of the Pureplay Agreement to preclude the Services from offering *any* marketplace agreements by statutory webcasters as benchmarks, SoundExchange itself moved into evidence agreements that expressly and directly reference the Pureplay rates as part of its own affirmative case. *See, e.g.*, SX Ex. 80 [REDACTED]; *id.* at 6 [REDACTED]; PAN Ex. 5156 at SNDEX0242128, SNDEX0242141 [REDACTED]; SX Ex. 100 [REDACTED]. In addition, the

¹⁰ Pandora’s Response to SoundExchange’s Objections to Testimony and Exhibits noted that SoundExchange had waived this argument by failing to bring a motion *in limine* before the April 1st deadline, even though in the days leading up to that pre-hearing motion deadline SoundExchange had informed Pandora that it was considering just such motion on that exact objection. *See* Pandora’s Response to SoundExchange’s Objections to Testimony and Exhibits, p. 1 & n.1 (Apr. 24, 2015).

record-company agreements with [REDACTED] that SoundExchange offered as by SoundExchange as evidence at trial [REDACTED] [REDACTED]. See SX Ex. [REDACTED]; SX Ex. [REDACTED]; Katz AWRW ¶¶ 189-96; Shapiro SWRT pp. 5-7; Fischel/Lichtman SWRT ¶¶ 20-26.

What is more, where it suited its own purposes to do so, SoundExchange did not hesitate to make various references to the Pureplay Agreement throughout the proceeding. SoundExchange's witnesses, for example, repeatedly claimed that in negotiations with the major record companies, statutory webcasting rates dragged down the rates the record companies could obtain from interactive services, and that a particular interactive service threatened to convert to a statutory service in order to avail itself of the lower Pureplay rate. See, e.g., Harrison CWDT ¶¶ 18-20; Kooker WRT pp. 19-20; Proposed Findings of Fact of SoundExchange ¶ 475; 7/21/15 Tr. 7725:13-7726:7 (SoundExchange Closing Argument). Additionally, SoundExchange's expert Dr. David Blackburn expressly referred to the 2013 per-performance fee that Pandora was paying under the Pureplay Agreement to contrast that rate with the royalties paid when a song is streamed on the iTunes Music Store.¹¹ Blackburn WDT ¶ 99 n.117.

SoundExchange also sought to have things both ways in depicting the economic effects of the Pureplay Agreement. On the one hand, SoundExchange repeatedly invoked the prevailing Pureplay rates in support of its own case, contending those rates "push[ed] down" the rates contained in its proffered interactive agreements, thus rendering its benchmark "conservative."

¹¹ Given this testimony, SoundExchange's contention that the Judges cannot consider the fact that SoundExchange's proposal would almost double Pandora's current payments (because that "is indirectly encouraging the judges to take into account the rates that Pandora currently pays ... [and] is simply not allowed under the statute") rings especially hollow. 7/21/15 Tr. 7693:16-7694:17 (SoundExchange Closing Argument).

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See 7/21/15 Tr. 7725:13-7726:7 (SoundExchange Closing Argument). On the other hand, SoundExchange goes so far as to contend that the Judges *cannot even consider* whether steering from one label's repertory to another's – a core feature of the Merlin Agreement and in evaluating its economics – is possible for a statutory webcaster because Pandora had the Pureplay Agreement to “fall back on.” See *id.* at 7694:18-7696:3.

The waiver doctrine exists precisely to preclude a litigant from asserting these types of inequitable and inconsistent “heads-I-win-tails-you-lose” positions. See *Nortel Networks, Inc. v. Gold & Appel Transfer, S.A.*, 298 F. Supp. 2d 81, 88 (D.D.C. 2004) (holding that waiver is “an equitable principle designed to ‘avoid a harsh result when the parties have conducted themselves in such a way as to make that result unfair. It serves to prevent a party from insisting on a right upon which he could have insisted earlier but has been found to have surrendered.’”) (quoting *In re K-Com Micrographics, Inc.*, 159 B.R. 61, 66-67 (Bkrtcty. D.D.C. 1993)). The intent to waive a known right – here, the purported protections of Section 114(f)(5)(C) – “need not be expressly stated but may be inferred from conduct inconsistent with an intent to enforce that right.” *Nortel Networks*, 298 F. Supp. 2d at 88; *In re K-Com Micrographics*, 159 B.R. at 67. Here, by both offering agreements that reference the Pureplay rates into evidence as part of its direct case, and arguing that the economic effects of the Pureplay Agreement redound to the favor of its interactive service benchmark, SoundExchange has waived any right to argue that such evidence, where proffered by the Services, is statutorily improper. We fail to see in any of SoundExchange's post-trial filings underlying this Reference a stated willingness to expunge SoundExchange's multiple evidentiary uses of the Pureplay Agreement in support of its affirmative case from the record of this proceeding.

C. SoundExchange Has Authorized the Evidence it Challenges According to Section 114(f)(5)(C)

Not only does the waiver doctrine preclude SoundExchange from objecting to the Judges' consideration of any benchmark agreements that contain terms that may reflect the existence of the Pureplay Agreement; Section 114 itself bars SoundExchange from asserting such a challenge. Section 114(f)(5)(C)'s proscription on offering into evidence agreements entered into pursuant to the Pureplay Agreement "shall not apply" where the "receiving agent," – *i.e.*, SoundExchange – and a webcaster authorize it to be used:

This subparagraph shall not apply to the extent that the receiving agent and a webcaster that is a party to an agreement entered into pursuant to subparagraph (A) expressly authorize the submission of the agreement in a proceeding under this subsection.

17 U.S.C. § 114(f)(5)(C).

SoundExchange has triggered this provision twice over. *First*, as detailed above, rather than seek to preclude any consideration of the Pureplay Agreement at the outset of the hearing, SoundExchange instead invoked the Pureplay Agreement time and again both as part of its direct examinations of its own witnesses and its cross-examinations of Pandora's witnesses –all without objection from Pandora. *See* Pandora Reply Findings § II.B. SoundExchange's written testimony likewise repeatedly discussed the Pureplay Agreement.¹² It was *SoundExchange* who


¹² *See* Talley WRT p. 27 ("Professor Shapiro (like Professor Katz) also fails to appreciate the importance of how observed negotiated prices among buyers and sellers are affected when they are executed in the shadow of statutory-licensing options (such as the statutory pureplay rate in the case of the Pandora-Merlin negotiation)."); *id.* at p. 54 ("[I]t bears noting that the Pandora-Merlin transaction was negotiated in the shadow of the 'pureplay' rate prevailing at the time."); p. 56 (referring to the Merlin Agreement as the "proffered benchmark that was negotiated in the shadow of the pureplay rate"); Rubinfeld CWRT ¶ 77(b) [REDACTED]

[REDACTED]; Barros WRT ¶ 20 ("[T]he [Merlin Agreement] required Pandora to [REDACTED]; Wheeler WRT ¶ 5 ("[T]he Merlin notification plainly indicated that Pandora operates currently under the 'Pureplay' rate structure and [REDACTED]

requested that it be allowed to conduct unfettered examination of witnesses regarding the Pureplay Agreement in an attempt to show that Pureplay Agreement casts a shadow over the Merlin Agreement, not Pandora. *See id.* (reporting multiple questions asked by SoundExchange's counsel in an attempt to show an effect that the Pureplay Agreement had on the Merlin Agreement). SoundExchange's multiple references (and Pandora's allowance of such) amounted to "authorization" of the use of Pureplay under Section 114(f)(5)(C). Moreover, by moving certain agreements into evidence that also reflect Pureplay terms, *see* PAN Ex. 5156, SX Ex. 80, and SX Ex. 100, SoundExchange "authorized" the admission of those agreements as well. It thus cannot be heard to object to the use of *other* marketplace agreements that may in some way refer to the existence of the Pureplay Agreement.

D. SoundExchange Should Be Judicially Estopped From Advocating a Position Regarding the Proper Scope of Section 114 That Is At Odds With Arguments It Successfully Pressed in *Satellite II*

SoundExchange's contention that consideration of the Merlin Agreement would violate Section 114(f)(5)(C) is also barred by the doctrine of judicial estoppel, as it conflicts with the position that SoundExchange took before the CRB in *Satellite II*. *See New Hampshire v. Maine*, 532 U.S. 742, 749-50 (2001). While no precise formula exists, the Supreme Court has held that judicial estoppel can apply when (1) a party takes a position that is clearly inconsistent with an earlier position; (2) the party has succeeded in persuading a court to accept that party's earlier position; and (3) the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped. *Id.* at 750-51; *Moses v. Howard Univ. Hosp.*, 606 F.3d 789, 792 (D.C. Cir. 2010).



In *Satellite II*, SoundExchange provided the Judges, through the testimony of one of its expert witnesses, with the effective percentage-of-revenue paid by Pandora to SoundExchange—a figure calculated by dividing Pandora’s royalty payments under the Pureplay Agreement by its revenues. *See* Pandora Reply Findings ¶ 57 (citing Ordover WDT, *Satellite II*, ¶ 59 & n.49). Although the effective percentage rate simply translated the per-play rates Pandora paid under the Pureplay Agreement into a percentage of revenue – and such per-play rates could be derived using the evidence SoundExchange introduced – SoundExchange argued that the complained-of testimony “simply report[ed] publicly available information about the percentage of Pandora’s revenue that it pays to SoundExchange[,]” and that “[t]he rate structure, fees, terms, conditions, or notice and recordkeeping requirements of the WSA agreement under which Pandora pays royalties are *not* being presentence into evidence” *See id.* ¶ 58 (citing SoundExchange’s Opposition to Motion by Sirius XM to Strike Portions of the Rebuttal Testimony of Janusz Ordover, dated 8/13/12, *Satellite II* (“*Satellite II* Opposition”), pp. 1-2).

SoundExchange further argued that “Dr. Ordover does not cite to or disclose any part of the WSA agreement with Pandora[,]” that he “does not provide testimony about the rate structure or the fees or terms, conditions or notice and recordkeeping requirements of the agreement are[,]” and that “[o]ne could offer the testimony that appears in Dr. Ordover’s Written Rebuttal Testimony even if one had never seen the Pandora WSA agreement.” *Id.* ¶ 59 (citing *Satellite II* Opposition, p. 2). The Judges held in SoundExchange’s favor, explaining that information that is “not evidence of the content or terms of a settlement agreement . . . [is not] covered by the statute.” *Id.* (citing *Satellite II*, 8/13/12 Tr. 3236:3-5).

The position that SoundExchange successfully advocated in *Satellite II* is clearly inconsistent with the position that it is taking here. At closing, for example, SoundExchange

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argued that the Court cannot just consider the fact that SoundExchange's proposal would almost double Pandora's current payments because that "is indirectly encouraging the judges to take into account the rates that Pandora currently pays ... [and] is simply not allowed under the statute." 7/21/15 Tr. 7693:16-7694:17 (SoundExchange Closing Argument). More to the point, as explained above, by introducing the privately negotiated Merlin Agreement, "[t]he rate structure, fees, terms, conditions, or notice and recordkeeping requirements of the [Pureplay] WSA agreement under which Pandora pays royalties are *not* being presented into evidence." See Pandora Reply Findings ¶¶ 58, 60 (quoting *Satellite II* Opposition, pp. 1-2). Professor Shapiro "does not provide testimony about the rate structure or the fees or terms, conditions or notice and recordkeeping requirements of the [Pureplay] agreement[,] and "could offer the testimony that appears in [his testimony] even if one had never seen the Pandora WSA agreement." See *id.* ¶¶ 59-60 (quoting *Satellite II*, 8/13/12 Tr. 3236:3-5). In addition to all the other infirmities in its legal position, SoundExchange should not be permitted to advocate a contrary position here as to the scope of the bar on use of the rates or terms reflected in the Pureplay Agreement than suited its advocacy in a prior proceeding.

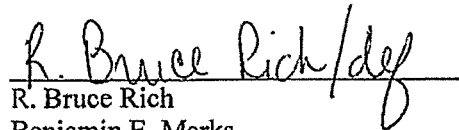
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CONCLUSION

For these reasons, Pandora respectfully requests that the Copyright Office answer "No" to each of the Referred Questions.

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Respectfully submitted,


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